

FEDERAL MARITIME COMMISSION

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PUBLIC HEARING ON

PETITION NO. P4-16

PETITION OF THE COALITION FOR  
FAIR PORT PRACTICES FOR RULEMAKING

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TUESDAY, JANUARY 16, 2018

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The meeting of the Federal Maritime  
Commission convened in the First Floor Hearing  
Room, 800 North Capitol Street, N.W., Washington,  
D.C., pursuant to notice at 10:00 a.m., Michael A.  
Khouri, Acting Chairman, presiding.

COMMISSIONERS PRESENT:

MICHAEL A. KHOURI, Acting Chairman

REBECCA F. DYE, Commissioner

DANIEL B. MAFFEI, Commissioner

COMMISSION COUNSEL PRESENT:

ROBERT BLAIR, Counsel to  
Commissioner Dye

JOHN A. MORAN, Counsel to  
Commissioner Khouri

CAROLL P. HAND, Counsel to  
Commissioner Maffei

1 STAFF PRESENT:

2 RACHEL E. DICKON, Assistant Secretary

3 OTHER PARTICIPANTS:

4 Panel 1: Coalition Panel

5 KARYN BOOTH, ESQUIRE  
6 Partner  
7 Thompson Hine, LLP

8 NICK DiMICHAEL, ESQUIRE  
9 Senior Counsel  
10 Thompson Hine, LLP

11 LAURA CROWE  
12 Senior Director, Global Logistics  
13 Wal-Mart Stores

14 DON PISANO  
15 President  
16 American Coffee Corporation

17 FRED JOHRING  
18 President  
19 Golden State Express

20 ROBERT LEEF  
21 Senior Vice President, East Region  
22 ContainerPort Group, Inc., representing the  
Association of Bi-State Motor Carriers

23 ALEX CHERIN  
24 Executive Director  
25 Englander, Knabe & Allen, representing the  
26 California Trucking Association International  
27 Conference

28 Panel 2: Shipper Panel

29 PETER FRIEDMANN, ESQUIRE  
30 Executive Director  
31 AgTC Agriculture Transportation Coalition

1 STEVEN HUGHES  
President/Chief Executive Officer  
2 HCS International, representing the Auto Care  
Association  
3  
4 SAM J. SORBELLO  
President  
Atlantic Coast Freezers, representing the Meat  
5 Import Council of America  
6  
7 TIM AVANZATO  
Lanca Sales, Inc.  
8  
9 FRANS A. de JONG  
President  
R1 International (Americas) Inc.

Panel 3: Intermediary Panel

10 RICHARD J. ROCHE  
11 Vice President of International Transportation,  
Mohawk Global Logistics  
12 NVOCC Sub-Committee Chairman at NCBFAA  
13  
14 CHARLES RILEY  
Chairman, Board of Governors, New York New  
Jersey Foreign Freight Forwarders and  
15 Brokers Association, Inc. (NYNJFFF&BA)  
Vice President, Steer Company  
16  
17 JEANETTE GIOIA  
Vice President Exports, New York New Jersey  
Foreign Freight Forwarders and Brokers  
18 Association, Inc. (NYNJFFF&BA)  
President, Serra International, Inc.

1 CAMERON W. ROBERTS, ESQUIRE  
2 Representing Roberts & Kehagiaras LLP and the  
Foreign Trade Association

3 JOSEPH T. QUINN  
4 President  
Sefco Export Management Company, Inc.

5 BRYAN VICKERS  
6 Pace LLP, representing the International  
Association of Movers

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1 P R O C E E D I N G S

2 CHAIRMAN KHOURI: Good morning. Just a  
3 brief opening comment. We're here for a hearing  
4 on the petition for rulemaking submitted by the  
5 Coalition for Fair Port Practices. Welcome to  
6 all, to all of our guests, to the witnesses.  
7 Thank you for volunteering to testify. Thanks to  
8 the Commission staff, so many of them, a lot of  
9 work to put all of this together. We have a full  
10 two days. I would ask the panel members, we need  
11 to stay on schedule for all the succeeding panels  
12 to come, so if we can stay within the five minutes  
13 and then give us time for what we hope is good  
14 dialogue between all of you all and our  
15 Commissioners. Every member of the panel will  
16 have the opportunity to supplement answers in  
17 post-hearing written statements. And  
18 Commissioners may, if they want, submit  
19 post-hearing written questions to panel members.  
20 So, thank you and I'll turn to my colleague,  
21 Commissioner Dye.

22 COMMISSIONER DYE: Thank you very much.

1 I have just a brief statement. My focus in the  
2 matter before us today is how ocean carrier and  
3 marine terminal demurrage attention approaches can  
4 optimize, not diminish the performance of the  
5 overall American international freight delivery  
6 system. As I said last month in my letter to the  
7 Commission, transmitting the results of the supply  
8 chain Innovation Teams Initiative, our  
9 international freight delivery system strains  
10 against the current demands placed upon it.  
11 Without a strong and dependable international  
12 commercial supply chain, the United States may not  
13 realize our greatest potential for robust economic  
14 growth and international competitiveness.

15 I believe that the liner shipping  
16 industry, its customers and the American consumer  
17 would benefit from addressing customer demurrage  
18 and detention issues in ways that maximize  
19 accessible and responsible customer service and  
20 minimize unintended consequences, of course. I  
21 also believe that we can agree that demurrage and  
22 detention processes should support prompt and

1       efficient cargo delivery. Improvements to those  
2       processes may require closer cooperation and  
3       visibility among ocean carriers, marine terminals  
4       and American shippers. I look forward to hearing  
5       the testimony of the witnesses today. I very much  
6       appreciate all of your being here and discussing  
7       the challenges regarding different carrier and  
8       terminal demurrage and detention policies and  
9       practices. Thank you very much.

10               CHAIRMAN KHOURI: Thank you.

11       Commissioner Maffei.

12               COMMISSIONER MAFFEI: Yes. Thank you  
13       very much, Mr. Chairman. It is good to see all  
14       of you. I do want to thank all of you, the  
15       witnesses for taking time out of your busy  
16       schedules. We've got many, many distinguished  
17       witnesses, starting with this first panel and I'm  
18       just thrilled that some of you traveled and I  
19       think it is very, very important to me, to my mind  
20       to be here in person and to discuss these issues  
21       in such an open forum. I think I join  
22       Commissioner Dye and the Chairman and all of our

1 staff when I say we really appreciate the  
2 enthusiastic response once these Commission  
3 hearings were announced. I do look forward to  
4 hearing what everybody has to say and getting  
5 answers to questions.

6 From the outset, I've been a huge  
7 proponent of holding these hearings as the next  
8 step in the Commissions consideration of this  
9 important petition. Hearings are the ideal forum  
10 to encourage an open and transparent discussion  
11 about what is clearly a challenging and complex  
12 issue. I also believe that the hearings are  
13 important in and of themselves since, if nothing  
14 else, they will allow us to see if there is common  
15 ground among the parties. It is my hope that  
16 whatever the outcome of the petition, the  
17 Commissions involvement will act as a catalyst to  
18 help resolve these difficult issues facing the  
19 industry. I am thrilled that the Commission moved  
20 forward so quickly with organizing and holding  
21 these hearings. I particularly want to thank  
22 Commissioner Dye, former Commissioner's Doyle and



1 Cordero and, of course, you, Mr. Chairman, to  
2 expedite these hearings and make sure that the  
3 Federal Maritime Commission is not seen as  
4 bureaucratic or sweeping any issues under the rug  
5 but that we are going to consider things as they  
6 come as quickly as we possibly can.

7 Finally, I would like to take a moment  
8 to thank the staff here at the Federal Maritime  
9 Commission for all the hard work they have done  
10 and put into this petition's consideration. We  
11 would not be able to hold these hearings without  
12 their hard work and dedication. Thank you very  
13 much, Mr. Chairman.

14 CHAIRMAN KHOURI: Thank you. Madame  
15 Secretary, would you proceed.

16 MS. DICKON: Thank you, Mr. Chairman.  
17 Good morning Mr. Chairman, Commissioners. Our  
18 first panel today is going to be, I'm going to  
19 turn it over to Karyn Booth in just a minute. But  
20 here with Ms. Booth we have Nick DiMichael, Laura  
21 Crowe, Don Pisano, Fred Johring, Robert Leef and  
22 Alex Cherin. At this point, I'll let you know

1       that when you begin speaking, the panelists, I  
2       will put five minutes on the timer so you'll be  
3       able to see. At this point, I'll turn it over to  
4       Ms. Booth.

5               MS. BOOTH: Thank you, Rachel. Good  
6       morning. Chairman, Khouri, Commissioner Dye and  
7       Commissioner Maffei, on behalf of the Coalition  
8       for Fair Port Practices, we want to thank you for  
9       scheduling this hearing and for the opportunity to  
10      appear before you today to explain the unfair  
11      demurrage and detention practices that American  
12      businesses experience when our nation's seaports  
13      are congested or otherwise inaccessible due to  
14      causes beyond their control. In our testimony,  
15      the coalition will explain the problems facing the  
16      many users of our nation's seaports with respect  
17      to demurrage and detention practices and the  
18      relief that its many members are seeking from the  
19      Commission. We hope to be able to answer all of  
20      your questions.

21              As shown on pages 2 and 3 of the  
22      handout, that I believe all of you have before

1       you, the coalition is comprised of 26  
2       organizations who represent tens of thousands of  
3       American business across broad and diverse  
4       industry sectors including, large and small  
5       importers and exporters of retail, auto, food,  
6       meats, coffee, tea, chemicals and other  
7       commodities. Motor carriers and drayage companies  
8       who operate at our nation's east, west and Gulf  
9       coast seaports. And logistics providers,  
10      forwarders and customs brokers from across the  
11      nation, all of whom support the petition pending  
12      before you.

13                Appearing for the coalition today are  
14      five company witnesses and legal counsel. We  
15      would like for the company witnesses to provide  
16      their statements first. Then it will be followed  
17      by counsel's testimony. To the extent that a  
18      company witness uses less than five minutes, we  
19      would asked that the unused time be allocated to  
20      counsel. At the conclusion of all testimony, we  
21      welcome your questions. With that, we'd like to  
22      start with Mr. Don Pisano and the company

1 testimony.

2 MR. PISANO: Good morning. I am Don  
3 Pisano, President of American Coffee Corporation.  
4 I am responsible for all operations including all  
5 ocean born containerized shipments. Our company  
6 handles approximately 2000 TEUs per year of green  
7 coffee beans from Asia, Africa, Central America  
8 and South America into 15 ports of entry along all  
9 three U.S. Coasts. While 2000 containers  
10 probably puts us into the small to medium sized  
11 shipper range, our span of activity gives us  
12 varied and pretty significant experience in  
13 dealing with carriers and marine terminal  
14 operators. From the experience, I must concur  
15 with most of the findings detailed in the FMC  
16 report issued April 3, 2015, on rules, rates and  
17 practices relating to detention, demurrage and  
18 free time for containerized imports and exports.  
19 In which it determined that there is no clear or  
20 standard manner in which carriers and terminal  
21 operators handle demurrage and detention issues,  
22 thus making comparisons quite difficult.

1                   While detention and demurrage charges  
2           are intended to encourage the timely pickup of  
3           containers from terminals and the timely return of  
4           equipment to the carriers, these charges are  
5           punitively applied in cases where it is impossible  
6           for the shipper to access the seaport due to  
7           congestion or other causes. While it is true that  
8           both terminal free time and equipment free time  
9           privileges may be negotiated with individual  
10          carriers, each carrier has its own policies  
11          regarding extended free time or waivers of charges  
12          which are generally tied to larger volume  
13          commitments. Smaller shippers, who generally lack  
14          the ability to secure anything more than the  
15          standard tariff filings.

16                 We maintain service contracts with  
17          several major carriers that do include free time  
18          privileges within the service contract terms.  
19          However, we are often in disagreements with our  
20          carriers and the terminal operators that serve  
21          them over the fair and practical application of  
22          those privileges and are regularly frustrated at

1       our inability to reach amicable settlements.

2               Over the past several years, our company  
3       has suffered through service disruptions caused by  
4       labor disputes between carriers and stevedoring  
5       unions which were totally beyond our control. In  
6       addition, our company and the drayman handling our  
7       containers, have experienced many incidences of  
8       severe congestion at container terminals as a  
9       result of larger vessels, the bunching of port  
10      calls and poor planning and coordination between  
11      the carrier and the MTO, all of which prevented  
12      the pickup of our cargo and return of empty  
13      containers within the allowed terminal and  
14      equipment free time privileges.

15             In some cases, terminal gates were  
16      closed without notice while our truckers had  
17      already been dispatched and were waiting in line  
18      to enter the terminal. We've also experienced  
19      numerous delays caused by U.S. governmental holds  
20      including customs, VACCAS exams and other  
21      examinations and inspections which are not always  
22      completed within the free time period allowed

1 under our negotiated carrier service contracts and  
2 for which we were eventually charged demurrage.

3 In a specific case included in my  
4 statement submitted in support of the petition  
5 filed by the Coalition for Fair Port Practices,  
6 our containers could not be removed initially due  
7 to a customs hold. But once the permit to  
8 transfer was received, we still had two days of  
9 free time remaining but were unable to secure  
10 appointments at the terminal which forced into  
11 incurring five days' worth of demurrage charges.  
12 Neither the customs hold nor the lack of available  
13 appointments were within our control. Frustrated  
14 by the carrier and terminal operator's refusal to  
15 negotiate a resolution, we actually did enlist the  
16 FMC's office of Consumer Affairs for mediation.  
17 But even the FMC's efforts were rebuffed.

18 While we can choose our carriers, it is  
19 the carrier who chooses the marine terminal  
20 operator. In the current environment with the  
21 proliferation of vessel sharing agreements, there  
22 is no longer any real expectation as to which

1 terminal will handle the cargo. Considering there  
2 is no relationship between the beneficial cargo  
3 owner and the marine terminal operator, the MTO is  
4 free to act with impunity without consequence to  
5 their business.

6           What the coalition is seeking is not to  
7 be relieved of demurrage and detention charges  
8 when cargo is not removed or equipment is not  
9 returned in a timely manner when those actions are  
10 within our control since we all benefit from an  
11 efficient carrier and port operations. Nor is it  
12 seeking some kind of advantage over the carriers  
13 or marine terminal operators. We are purely  
14 seeking an establishment of fair business  
15 practices which can be uniformly applied  
16 throughout the U.S. port system. Surely the  
17 Federal Maritime Commission in its role to ensure  
18 a fair and competitive ocean shipping environment,  
19 has the authority and the wherewithal to require  
20 that shippers are not unfairly penalized when  
21 access to the goods is denied for a reason for  
22 which is beyond the shippers control. We



1 respectfully urge the Commission to take action to  
2 offer guidance to the industry as to the demurrage  
3 and detention practices that are fair, reasonable  
4 and consistent with the Shipping Act in such  
5 circumstances. Thank you for your time.

6 MS. CROWE: Hello everybody. My name is  
7 Laura Crowe and I'm the senior director of global  
8 logistics for Wal-Mart. My team oversees the  
9 movement of merchandise from purchase order  
10 creation to the port of destination and in the  
11 U.S., to the first distribution center. Wal-Mart  
12 is globally the largest Beneficial Cargo Owner  
13 with the vast majority of the volume coming into  
14 U.S. ports and terminals. We strategically  
15 diversify our port usage moving 35 percent of our  
16 volume through the west coast, 24 percent of our  
17 volume via the Gulf, and 41 percent of our volume  
18 via the east coast. As my testimony will show,  
19 despite our size, it is very difficult to leverage  
20 our volume to achieve business solutions in  
21 regards to demurrage. To understand why, I think  
22 it is important to look at the history of the

1 industry and what has gotten us to this point.

2 Historically, the Beneficial Cargo Owner  
3 or BCO, had a contract with a steamship line and  
4 the steamship line managed the movement of the  
5 cargo, in our case, from on board the vessel  
6 throughout gate at the destination terminal. This  
7 steamship line managed the terminal relationship  
8 on behalf of the BCO and the BCO did not have  
9 direct contract with the terminals. The steamship  
10 lines operated smaller ships and called terminals  
11 where they had either influence or a direct  
12 relationship. As the industry has changed, we are  
13 now in the era of ultra large ships, mega  
14 alliances where the steamship line calls different  
15 terminals and often does not have the relationship  
16 with those terminals to champion the BCO.

17 Historically, we also had smaller  
18 vessels and more sailings calling a terminal.  
19 Therefore, the BCO, via the steamship line, had  
20 multiple vessels arriving each week with smaller  
21 amounts of cargo on each vessel. As the trend of  
22 larger vessels and alliances grew, the amount of

1 sailings diminished and the amount of cargo on  
2 each sailing increased. Many terminals became  
3 congested and the reality of out gating the cargo  
4 became more difficult. However, the amount of  
5 free time to get the cargo out gated did not  
6 increase and it ended up creating a revenue stream  
7 for the terminals.

8           The competition between ports and  
9 terminals does exist in some areas. But in many  
10 of the ports and terminals, there is no  
11 competition as they are state run, creating only  
12 one option within that geographical area to  
13 receive our shipments. We have fixed assets in  
14 markets where the terminals and ports have  
15 exclusive control. In these markets, the  
16 terminals and ports do not appear to have a market  
17 incentive to reach agreements with Wal-Mart or  
18 other users. They often defer to the ocean  
19 carrier, because we do not have direct contracts  
20 with the terminals. And then that carrier  
21 approaches the terminal on behalf of Wal-Mart, the  
22 carrier is told that the terminal will not change

1 the demurrage policy.

2           Additionally, these demurrage policies  
3 are not equitable to all stakeholders. For  
4 example, this year in a southeast terminal, our  
5 average dwell was two days more than our free  
6 time. Due to exceeding the tariff dwell by just  
7 under two days, we incurred significant demurrage  
8 fees in the millions. But if conversely, if we  
9 look at that same southeast terminal in the  
10 previous year, Wal-Mart cargo dwelled on average  
11 three days less than the tariff free time. But  
12 there was no benefit to Wal-Mart for moving the  
13 cargo expediently or any consideration of this  
14 fact when we requested mitigation of the current  
15 year demurrage fees. These terminals seem to have  
16 no economic motivation to change or engage with  
17 the BCO to find solutions. While we could work a  
18 contract on a separate demurrage policy directly  
19 with the terminal, as I've illustrated where we're  
20 a captive user, we have minimal economic leverage.

21           Conversely on the west coast, which by  
22 all accounts have more congested terminals, there

1 is competition and the terminals actively work  
2 with Wal-Mart in order to have Wal-Mart choose to  
3 route the cargo via that terminal. We still run  
4 into issues with lack of appointments or cargo not  
5 being available, but we can contractually manage  
6 these issues with the steamship lines and interact  
7 directly with the terminals. The issue demurrage  
8 is important due to the amount of money that is  
9 involved. In 2016, our cargo was pulled from the  
10 terminals, on average 2.5 days shorter than the  
11 free time. In 2017, our cargo was pulled from the  
12 terminals on average 1.5 days less than the free  
13 time. But the difference of one day in charges  
14 between 2016 and 2017 are in the tens of millions  
15 of dollars. This is a troubling trend that is due  
16 in large part, to increasing port congestion that  
17 is outside the control of Wal-Mart.

18 We believe that there is a market  
19 failure at certain ports and terminals in this  
20 country. This failure results in unnecessary cost  
21 to both businesses and consumers. For this reason,  
22 we support the petition before the Commission, and

1 would welcome guidance on problematic demurrage  
2 policies. Thank you for your time and  
3 consideration.

4 MR. LEEF: Good morning. My name is  
5 Robert Leef and I'm the senior vice president for  
6 the east region of Container Port Group. Since  
7 1977, I have been involved in ocean  
8 transportation, first with U.S. Lines, then as a  
9 drayage carrier owner for 20 years and now with  
10 Container Port Group. Container Port Group is one  
11 of the oldest international drayage companies in  
12 the United States. Our network of 20 terminals  
13 are primarily in the Midwest, Ohio Valley, Gulf  
14 and East Coast. I'm responsible for all  
15 operations for our terminals from Buffalo, New  
16 York to Savannah Georgia including all port and  
17 rail cities. In my capacity, I daily deal with  
18 truck drivers that complain about excessive days  
19 and turn times at the various marine terminals at  
20 our nation's seaports that are caused by  
21 circumstances beyond our control. Our operations  
22 team report to me, the significant demurrage and

1 per diem exposure we have due to delays and the  
2 limited hours of operations. Our company in 2017,  
3 spent approximately \$369,000 for detention per  
4 diem and demurrage charges the substantial  
5 majority of which were caused by delays that were  
6 beyond our control.

7 As explained in my statement submitted  
8 in support of the coalition's petition, in  
9 2014/2015 and early 2016, CPG and the independent  
10 contractors who haul on our behalf, experienced  
11 port delays caused by labor disruption, weather,  
12 road construction, chassis shortages, systems  
13 failures and port congestion. Despite the various  
14 factors that were beyond the control of the motor  
15 carrier, many vessel operating common carriers and  
16 marine terminal operators still assessed both per  
17 diem and demurrage fees in accordance with the  
18 UIIA and the marine terminals operating schedules.

19 Specifically, I explained that we have  
20 been charged per diem in situations where  
21 containers were returned within the allotted free  
22 time to the rail ramps in Columbus, Ohio and then

1       railed to the port of Norfolk, Virginia which was  
2       closed due to a snow storm. The vessel operating  
3       common carrier insisted that CPG or another party  
4       was liable for per diem incurred while the unit  
5       sat at the closed port.

6               In another example, we were assessed  
7       substantial per diem during the heavy port  
8       congestion in Norfolk caused by the winter storms  
9       of 2015. When we disputed the charges, the vessel  
10      operating common carrier rejected our dispute  
11      stating, we do not waive per diem due to  
12      congestion. We encourage the truckers to email  
13      for the last free day so that can plan ahead. The  
14      best I can do is offer you a payment plan for the  
15      invoices because unfortunately, you will get shut  
16      out.

17             Today, the World Shipping Council and  
18      the National Association of Waterfront Employers,  
19      indicate that congestion and associated detention,  
20      demurrage per diem issues are no longer a problem  
21      or have subsided, thereby rendering the relief  
22      sought by the petition moot. This is not a true



1 statement. Based on my experience and the  
2 coalition has demonstrated, port congestion and  
3 other events impeding port access have occurred  
4 periodically for many years and will undoubtedly  
5 occur again. For example, the port of Baltimore  
6 was frustrating during 2017. In February, delays  
7 for reasons out of our control started when turn  
8 times were exceeding four hours. The delays  
9 increased throughout the year and resulted in  
10 significant demurrage and detention charges for  
11 delays out of our control.

12 The ocean carriers and terminals claim  
13 that commercial negotiations can address concerns  
14 over demurrage, detention and per diem. However,  
15 that has not been my experience. As I have stated  
16 in some cases, the carrier refuses to negotiate.  
17 In other instances where issues are eventually  
18 resolved, the business owner has already incurred  
19 significant loss of time, recesses inefficiencies  
20 which translate into lost revenue. This hurts  
21 American business and all the more reason the FMC  
22 should step in and help address unfair demurrage,

1 detention and per diem practices.

2 Also, it is apparent that the port  
3 congestion and related demurrage detention issues  
4 have become heightened in recent years due, in  
5 part, to the snowball effect of substantially  
6 larger vessels. In 1977, when I started my career  
7 at U.S. lines, the largest vessels carried 1210  
8 TEUs. During that time, Howl and Hook marine  
9 terminal in the port of New York/New Jersey, had  
10 hours of Monday to Friday 7 am until 4 pm. Today  
11 in the port of New York/New Jersey, we have  
12 vessels that are over 10000 TEUs in size. Yet the  
13 majority of the marine terminals still maintain  
14 the same hours of operation, Monday to Friday, 7  
15 to 4.

16 While ports have attempted to solve  
17 these problems through commercial negotiations, my  
18 experience is that these efforts are not  
19 sufficient. For example, during the summer of  
20 2013, the port of New York/New Jersey experienced  
21 severe congestion because of a variety of  
22 problems. They included labor shortages,

1 operating system failures, a shortage of chassis,  
2 construction and other related issues. The port  
3 also experienced a severe winter with record snow  
4 and ice and subfreezing temperatures.

5 In 2013, the Port Authority convened the  
6 Port Performance Task Force, in an effort to solve  
7 the congestion issues. The task for was comprised  
8 of representatives from labor, marine terminal  
9 operators, ocean carriers, railroads, truckers,  
10 intermodal equipment providers, maintenance  
11 contractors, beneficial cargo owners, three PLs,  
12 and the New York Shipping Association and the Port  
13 Authority. In June 2014, the group issued a  
14 report but despite these efforts, three years  
15 later, we are still faced with the exact same  
16 problems that were identified in 2014. It is time  
17 for the Federal Maritime Commission to help  
18 address this situation and implement guidelines  
19 for everyone to follow. I thank the Commission  
20 for holding this hearing and for the opportunity  
21 to share my views on this important topic.

22 MR. JOHRING: Good morning. My name is

1 Fred Johring. I'm the President and owner of  
2 Golden State Express and the chairman of Harbor  
3 Trucking Association. Golden State Express  
4 operates roughly 30 trucks in the port of Los  
5 Angeles and Long Beach. The Harbor Trucking  
6 Association is a coalition of Los Angeles, Long  
7 Beach and Oakland intermodal carriers whose  
8 purpose is to advocate, educate and promote  
9 strategies with other goods movements stakeholders  
10 and policy makers that will provide a dialogue for  
11 intermodal truck deficiency.

12 Today, I will cover several key issues  
13 in regard to the extreme port congestion that  
14 resulted in the unfair assessment of demurrage and  
15 detention charges of more than \$100,000 to our  
16 company alone over the 2014/2015 time period for  
17 causes that were completely out of our control. A  
18 number of these problems continue today in various  
19 context. First, some facts. In 2013, before the  
20 congestion created by the west coast labor  
21 negotiation and port slow down, the 30 trucks  
22 operated by my company handled more than 12,000

1 loads to and from the port. An average turn time  
2 for a truck in the San Pedro Bay port was 69  
3 minutes. In 2014, the same amount of trucks  
4 handled just 8,308 loads with an average turn time  
5 of 112 minutes. In 2015, these same trucks were  
6 able to complete only 5,615 turns at an average  
7 turn time of 89 minutes.

8 But even since then, turn times have not  
9 returned to the numbers we experienced prior to  
10 2014. A sign that congestion at the ports is a  
11 continuing and growing problem. For example,  
12 driver productivity which was three or more round  
13 trips a day in 2013, has dropped to between one  
14 and one and a half round trips after the slowdowns  
15 of 2014 and 2015. This means that it is  
16 impossible for drivers to achieve the number of  
17 turns necessary to move the necessary volume from  
18 the terminals during the allotted free time. This  
19 past and ongoing congestion has created large  
20 amounts of detention and demurrage charges. We've  
21 been assessed tens of thousands of dollars in  
22 demurrage and detention over and above the cost to

1 us of missed appointments, dry runs due to  
2 congestion and inability to complete transaction  
3 in the time necessary and for causes that were  
4 completely beyond our control.

5 The system makes it impossible to be  
6 treated fairly. For example, free time, typically  
7 four working days, is counted whether the  
8 container is available or not. Demurrage and  
9 detention must be paid before the container can be  
10 removed and often before the appointment can be  
11 made. The fact of the matter is that it is  
12 virtually impossible to pick up and drop off many  
13 containers in the allotted amount of free time  
14 given for the assessment of demurrage and  
15 detention.

16 Finally, terminal operators have claimed  
17 that carrier and terminal competition makes it  
18 possible for importers and drayman to choose their  
19 carriers and terminals based on their free time,  
20 demurrage and detention rules and practices. But  
21 while drayman often suggest to importers which  
22 terminals they prefer, in reality, only a very

1       small minority of importers have the influence to  
2       require a carrier to discharge their goods at a  
3       particular location. In a large majority of the  
4       cases, the steamship line contracts with the  
5       terminal based on their own criteria. I would ask  
6       the Commission to look at these practices as  
7       unreasonable. It's our opinion that the process  
8       of assessing demurrage and detention is broken and  
9       outdated. We would urge the Commission to take  
10      measures to reform this process in a way that does  
11      not allow large foreign national companies to put  
12      small American companies out of business, which is  
13      what happened to many of my colleagues during the  
14      slowdown of 2014 and the Hanjin bankruptcy. Thank  
15      you for your time.

16               MR. CHERIN: Honorable Chair and  
17      Commissioners, I want to thank you for this  
18      opportunity to testify before you today. My name  
19      is Alex Cherin and I currently serve as the  
20      executive director of the California Trucking  
21      Association's Intermodal Conference. Our  
22      membership consists of over 250 trucking drayage

1       and logistics companies doing business imports  
2       throughout the state of California. Together with  
3       our friends at the Harbor Trucking Association  
4       represented here today by Mr. Fred Johring who  
5       just testified, and their CEO Weston LaBar who is  
6       in the crowd, we represent nearly 60 percent of  
7       all drayage import related trucking activity at  
8       the ports of Los Angeles and Long Beach, the  
9       nation's largest seaport complex.

10               I also want to note by way of context,  
11       that prior to my role with the CTA, I had the  
12       honor of serving as the managing director for  
13       Trade Relations and Port Operations at the Port of  
14       Long Beach. In both of these roles, I have come  
15       to learn that the issue of port related congestion  
16       generally and congestion impacting the ability of  
17       drayage operators to facilitate the pickup and  
18       delivery of cargo from marine terminal  
19       specifically, is complex and multifaceted.  
20       However, what remains clear is that the Federal  
21       Maritime Commission is uniquely positioned, more  
22       so than any other government agency and certainly



1 more so than any other commercial concern, to set  
2 guidelines and a common understanding of what is  
3 fair and not fair in terms of the business  
4 practices impacting detention, demurrage and per  
5 diem, some of the byproducts of port related  
6 congestion.

7 For that reason and many others which  
8 you'll hear about today, the CTA Intermodal  
9 Conference strongly supports the request contained  
10 in the subject petition before the FMC to issue a  
11 policy statement containing guidance and specific  
12 standards regarding the issuance of unreasonable  
13 detention and demurrage practices by ocean  
14 carriers and MTOs when the charges are assessed  
15 for port delays that are beyond the control of the  
16 shipper, receiver or drayman. Much to your  
17 relief, I'm sure, the CTA is not asking you to  
18 solve port congestion here today. However, for  
19 too long, certain operational practices at the  
20 ports of Los Angeles and Long Beach, by example,  
21 have left draymen with no other option than to ask  
22 for the assistance in issuing these guidelines.

1                   From intermittent and inconsistent gate  
2                   openings and closures, lack of adequate notice to  
3                   supply chain members regarding hours of operation  
4                   at certain terminals. Onerous requests for the  
5                   repositioning of chassis and other equipment, lack  
6                   of available appointments and understaffing of  
7                   labor by MTOs, congestion has left the local  
8                   trucker and his or her BCO customer to foot the  
9                   bill for charges caused by circumstances well out  
10                  of their control.

11                  While a commercial solution may seem  
12                  appropriate, I can assure you we have tried and  
13                  tried again. I can recall, while on the Port of  
14                  Long Beach executive staff, convening a meeting of  
15                  local stakeholders to talk about the very issue  
16                  we're here to talk about today. That meeting was  
17                  in 2009. Subsequent to those efforts, there have  
18                  been dozens and dozens of meetings, roundtables,  
19                  stakeholder committees, some facilitated by the  
20                  ports themselves, some facilitated by various  
21                  members of the supply chain and even some  
22                  facilitated by this Commission. While those

1 discussions have shown to be fruitful in nurturing  
2 and furthering the relationship between truckers,  
3 MTOs and others, the core practices of charging  
4 detention and other fees when inappropriate,  
5 remains.

6           Despite our appreciation for the  
7 involvement of various agencies from the state of  
8 California assembly select committee on ports, to  
9 the Port of Los Angeles and Long Beach stakeholder  
10 roundtables, I remain convinced that the FMC is  
11 the only entity that is positioned to affectively  
12 referee this issue addressed in the petition. The  
13 current assessment of detention and demurrage is  
14 imposed by one entity among many in a supply  
15 chain. That entity has a vested financial  
16 interest in the operation of the terminal gate.  
17 That is to say that as long as only one entity  
18 among many in the supply chain serves as the  
19 gatekeeper for cargo, when and how a container can  
20 be picked up, that entity will always do what is  
21 in its best economic interest first and what is in  
22 the best interest of the supply chains efficiency

1 second.

2 This Commission need look no further  
3 than the current administration of the Pier Pass  
4 program to see this. While we understand the  
5 impact that downward pricing pressures have on the  
6 good movement industry, members of the CTA and  
7 other drayage entities remained convinced that as  
8 long as MTOs and not a neutral agency like the FMC  
9 set the guidelines, those guidelines will be  
10 skewed to one supply chain members benefit and to  
11 another's detriment. That is why the CTA and  
12 others are asking this Agency to help.

13 On behalf of the California Trucking  
14 Association, we respectfully request that the FMC  
15 issue a policy statement as requested in the  
16 petition setting clear guidelines and rules for  
17 all of us as to what constitutes unfair business  
18 and operational practices when it comes to charges  
19 from detention, demurrage and per diem. Our  
20 trucking industry is willing to pay those  
21 appropriate and necessary charges born by our  
22 missed appointments or poor planning. Yet asking

1       for consistent gate hours, a reasonable  
2       appointment structure, not to be burdened with  
3       wasteful equipment repositioning so that we can  
4       pick up cargo in a timely and efficient manner for  
5       all of our mutual customers, is not a heavy lift  
6       in our collective opinion. I want to thank you  
7       for your time and look forward to answering any  
8       questions you may have.

9               MS. BOOTH: As the Commission has just  
10       heard, American businesses have experienced unfair  
11       demurrage and detention practices when the causes  
12       of port congestion and delays are completely  
13       beyond their control. These practices directly  
14       conflict with the very purpose of demurrage and  
15       detention as described in longstanding Commission  
16       precedent. And that is, demurrage and detention  
17       are charges that are intended to incentivize the  
18       timely removal of cargo from terminals and the  
19       timely return of a equipment. But when a port is  
20       inaccessible preventing the removal of cargo or  
21       equipment return, it is unreasonable to penalize  
22       the shipper or drayman in cases where they have no

1 control over the cause and no power to address the  
2 delays. The issues raised in this proceeding do  
3 not concern only past events as you have just  
4 heard. Rather, larger vessels offloading  
5 increasing volumes of cargo at our nation's  
6 seaports, labor disputes, hurricanes and snow  
7 storms, have created severe congestion in the past  
8 and will likely do so again the future.

9 The Commission itself recognized  
10 demurrage and detention practices assessed during  
11 port congestion as a serious issue during its 2014  
12 field hearings and its staff issued its own report  
13 on the topic in 2015. In that report, the  
14 Commission identified options for BCOs and drayman  
15 to consider to address the issue, including  
16 petitioning this Commission for a rule making.  
17 The coalition carefully evaluated those options  
18 which led to the filing of its petition and  
19 requests for the Commission to take action to help  
20 address this problem. American business depends  
21 on competitive and efficient ocean transportation.  
22 The lack of any standards as to what constitutes

1       unreasonable demurrage and detention practices,  
2       leads to unfairness which undermines the integrity  
3       and efficiency of the U.S. ocean transportation  
4       system.

5               We are here today to reaffirm the  
6       coalition's request for the Commission to exercise  
7       its authority to address this problem by issuing a  
8       policy statement that interprets existing  
9       requirements under the shipping act that prohibit  
10      unreasonable demurrage and detention practices.  
11      The coalition strongly believes that an FMC policy  
12      statement would help eliminate confusion over  
13      proper demurrage and detention practices. It  
14      would eliminate many demurrage and detention  
15      disputes and it would help facilitate commercial  
16      solutions. With that I'd like to turn it over to  
17      Nick DiMichael who will address why relying solely  
18      on commercial solutions is not adequate to solve  
19      the problem.

20             MR. DIMICHAEL: Members of the  
21      Commission, as noted on page 6 of the handout  
22      which we gave to you, carriers and terminals have

1       claimed that existing commercial arrangements can  
2       adequately address the problem. We respectfully  
3       disagree. Labor problems and other congesting  
4       causing events occur with regularity but it has  
5       become increasingly clear that the market has not  
6       been able to come up with fair demurrage and  
7       detention practices in cases where the causes of  
8       delay is preventing the movement of containers,  
9       are out of the control of the shipper or drayman.  
10      Indeed, some of these problems such as congestion  
11      caused by the use of larger vessels as you've just  
12      heard, have increased. In most cases, terminals  
13      and carriers are in the best position to address  
14      port delays and congestion, not the shipper or  
15      drayman. Shippers and drayman do not have the  
16      ability to solve labor disputes, they don't  
17      control the loading and unloading of vessels or  
18      terminal appointments. That can't control even  
19      snow removal after a storm. Yet when these delays  
20      occur, carriers and terminals typically still  
21      demand payment of demurrage and detention up front  
22      to secure the release of cargo, even when the very



1 purpose of the charges to incentivize the timely  
2 removal of cargo can't be met. The lack of any  
3 regulatory guidance on the reasonableness of such  
4 practices, results in substantial confusion,  
5 obfuscation, denial and delay.

6 Experience has shown that relying solely  
7 on commercial solutions in these matters, leads to  
8 major inefficiencies as parties must address  
9 whether the payments were proper after the fact.  
10 Many shippers and drayman and even larger ones do  
11 not have often the commercial leverage to  
12 negotiate contract terms to fairly address the  
13 problem. But another very significant barrier to  
14 effective commercial solutions, is the shippers  
15 and draymen lack contractual privity with the  
16 terminals but they rather negotiate with ocean  
17 carriers. This structure often impedes the  
18 effectiveness of BCO carrier negotiations since  
19 the terms are set by the terminals and those  
20 dictate what the VOCC is willing to negotiate.  
21 The status quo hurts American business who depend  
22 upon an efficient ocean transportation system and

1 is flatly inconsistent with the policies of the  
2 administration which seeks to promote fair  
3 business practices for American companies. Karen  
4 will now address why the Commission should step in  
5 to help industry address these unfair practices.

6 MS. BOOTH: Thank you, Nick. As  
7 indicated on page 7 of the handout, the Commission  
8 is empowered under § 41102 of the Shipping Act to  
9 ensure that carriers and terminal establish just  
10 and reasonable regulations and practices relating  
11 to the receiving, handling, storing and delivering  
12 of property. It has long been established under  
13 Commission precedent that free time and demurrage  
14 detention, fall within this prohibition.

15 The Commission's authority to issue  
16 guidance as to unreasonable practices under 41102  
17 is clear and unequivocal. However, the ocean  
18 carriers and terminals have wrongly claimed that  
19 the proposed policy statement as the agency to  
20 prescribe commercial tariff rules and that the  
21 Commission lacks that authority. This is nonsense.  
22 Unlike the 1946 New York Rules case, nowhere does

1 the policy statement prescribe the number of free  
2 time days or the level of demurrage or detention  
3 charges that must be included in tariffs. The  
4 opponents wrongly conflate the statements  
5 interpretation of an unreasonable practice that  
6 may occur during port congestion as a prescription  
7 of reasonable free time and demurrage and  
8 detention tariff rules. The very wording of the  
9 policy statement belies this claim. The  
10 Commission is the only party empowered by Congress  
11 to address unfair business practices employed  
12 through detention and demurrage charges. The  
13 Commission and its staff have the expertise needed  
14 and we have faith in your abilities to craft a  
15 policy statement that can address this problem in  
16 a proactive manner rather than through binding  
17 regulations. Thus, we strongly urge you to  
18 exercise this authority. And now Nick will  
19 specifically address the coalition's policy  
20 statement.

21 MR. DIMICHAEL: On page 8 of your  
22 handout, you can see that the coalition is

1        requesting the Commission to issue a policy  
2        statement that would interpret § 41102(c) to mean  
3        that when an ocean carrier is unable to tender  
4        cargo and such disability is beyond the control of  
5        the shipper or drayman, then it would be  
6        unreasonable to fail to extend free time or charge  
7        penalty demurrage. The requested policy  
8        statement, if you look at the handout on page 9,  
9        is consistent with the carrier's common carrier  
10       obligation as well as some existing commercial  
11       practices. You'll see on that page 9 that CMA,  
12       COSCO, mayor terminals and the Port of Long Beach  
13       all publish tariffs that extend free time when the  
14       carrier is, for any reason, prevented from  
15       tendering cargo or cargo cannot be loaded at the  
16       terminal. The rules of these good actors, and we  
17       appreciate this, indicate that the requested  
18       policy statement is consistent with some existing  
19       commercial practices but the policies of these  
20       good actors are far from universal.

21                    If you look on page 10 of the handout,  
22        you can see the coalition is asking for the

1 issuance of a policy statement and not a binding  
2 rule. The wording of the proposed policy  
3 statement states that its purpose is  
4 interpretation of the statute. The wording is  
5 similar in form to wording that the Agency has  
6 used for policy statements or interpretive rules  
7 it has issued in the past. The distinction  
8 between a policy statement and legislative rule is  
9 crucial. The policy statement is not a binding  
10 rule that can be enforced through civil penalties.  
11 Rather, any person who believes that the carrier  
12 or the MTO is acting inconsistent with the policy,  
13 would have to file a complaint with the Agency. In  
14 that complaint, the Agency would then have the  
15 power to examine individual facts and  
16 circumstances to determine if the carrier had  
17 acted unreasonably. Yet, the policy statement  
18 would give broad guidance to the industry  
19 indicating how the Commission would likely  
20 exercise its discretion in the ordinary  
21 circumstance. The policy statement would  
22 therefore incentivize carriers and MTOs to adopt

1 reasonable demurrage and detention rules.

2           Thus, the issuance of a policy statement  
3 is consistent with this administration's focus on  
4 deregulation since it would not be a binding  
5 legislative rule and would help the efficiency of  
6 the marketplace. Karen will now address the  
7 flexibility inherent in the policy statement.

8           MS. BOOTH: Great. Thanks Nick. In the  
9 Commission's press release announcing this  
10 hearing, Chairman Khouri asked whether the  
11 Commission could craft a general rule given the  
12 wide variety of commercial terms and disparate  
13 operating protocols at our nation's seaports. The  
14 answer to these questions is yes. First, we do  
15 not seek a binding legislative rule as Nick just  
16 explained. And because a policy statement is a  
17 statement of general intent that industry can use  
18 to self-govern demurrage and detention practices,  
19 it must be applied based on the individual factual  
20 circumstances. Particularly with respect to this  
21 one issue whether the port delays are beyond the  
22 control of the shipper or the drayman. Thus, it

1 is designed to be flexible and not a rigid rule.

2 Second, the policy statement does not  
3 dictate the specific terms of service contracts or  
4 tariffs, quite the opposite. It allows for a wide  
5 variety of commercial terms because it does not  
6 require adoption of a specific free time period at  
7 any port. It does not dictate the arrangements  
8 for cargo pickup and it does not set the level of  
9 demurrage and detention charges. Similarly, the  
10 policy statement allows for a wide variety of  
11 operating protocols at the ports. It does not say  
12 anything about how vessels are to be loaded or  
13 unloaded, how cargo moves through the port, how  
14 gate operations will work or how any other port or  
15 terminal operations are to be performed. The  
16 requested policy statement focuses on one thing.  
17 The unreasonableness of levying penal demurrage  
18 and detention when it is impossible for the  
19 shipper or drayman to access the terminal to  
20 timely pickup cargo or return equipment. And  
21 where the very purpose underlying these charges  
22 cannot be achieved.

1                   I see my time is up, I'm going to wrap  
2           up here with our conclusion. We believe the  
3           Commission has a very comprehensive record already  
4           before it in this proceeding. Which justifies  
5           issuance of the policy statement that industry can  
6           use to govern itself. Even though it was never  
7           required, the coalition asked for a notice and  
8           comment proceeding as a procedural matter so that  
9           the Commission could get the very broadest of  
10          input as to the scope and wording of the policy  
11          statement. If the Commission believes that any of  
12          the words of the proposed statement need to be  
13          changed, that should be addressed in the context  
14          of a rulemaking proceeding. The time to address  
15          this problem is now before the next case of severe  
16          port congestion strikes. By proactively  
17          discouraging the use of unreasonable demurrage and  
18          detention practices and providing industry with  
19          the tools that it needs to more efficiently  
20          resolve demurrage and detention disputes. Thus,  
21          we very respectfully request that you grant the  
22          coalition's petition and issue a policy statement



1 interpreting unreasonable demurrage and detention  
2 practices under § 41102 of the Act. With that, we  
3 all would be very glad to answer your questions.  
4 Thank you.

5 CHAIRMAN KHOURI: Thank to all for your  
6 comments. Where to start from, different points  
7 of view. In your supplement, the supplement says  
8 that the proposed policy would reduce congestion.  
9 Can you help educate us on how the policy will  
10 itself is going to reduce congestion?

11 MS. BOOTH: The policy statement is  
12 designed to address demurrage and detention  
13 charges during port congestion so that is the  
14 primary focus. But it will incentivize proper  
15 behavior on the part of the terminals and carriers  
16 based on those policies to do the right thing and  
17 make sure that congestion is reduced. They have  
18 the power to address the causes of congestion,  
19 like Nick had mentioned. If there is a snow  
20 storm, they're the ones that need to plan for the  
21 salt and the snow plows. If larger and larger  
22 vessels are being unloaded at the ports, they're

1 the ones that have the power to address those  
2 issues. This statement will encourage the  
3 terminals and the carriers to address those  
4 factors through ensuring that there won't be  
5 unreasonableness with respect to the free time  
6 demurrage and detention charges.

7 MR. DIMICHAEL: I would simply add that  
8 the present circumstance creates, in a sense,  
9 disincentives. If those things happen, the  
10 carriers and the MTOs can collect demurrage. But  
11 if now, demurrage can't be charged for things that  
12 the shipper and the receiver and the drayman can't  
13 be responsible for, that will incentivize those  
14 people who can do something about the problem and  
15 that's what we want.

16 MR. JOHRING: As an example of the  
17 disincentives, I had drivers sitting in a line at  
18 a terminal the other night for more than two  
19 hours. During that two hours, their appointment  
20 expired and the terminal refused to extend the  
21 free time or extend the appointment. The answer  
22 was, pay the demurrage, pay the pier pass and get

1       it tomorrow. So, they've got the incentive to  
2       make it not work right now.

3               MR. PISANO: And that left your  
4       container at the terminal for an extra day.

5               MR. JOHRING: It did.

6               CHAIRMAN KHOURI: The general statement  
7       that if it's not the fault of the BCO then it  
8       reverts to the carrier being responsible. There  
9       are many situations where could we agree that they  
10      are mutually not at fault.

11              MR. PISANO: Yes, I believe that happens  
12      quite often. But the fact of the matter is that  
13      the demurrage charges are assessed at a punitive  
14      level as opposed to a compensatory level. I've  
15      been in the business for over 40 years and I have  
16      never once paid a compensatory level of demurrage,  
17      it's always at a punitive level. So, when there  
18      is an act of God or a situation which is beyond  
19      the control of both the Beneficial Cargo Owner and  
20      the carrier or the terminal operator, there is  
21      often a situation to exist. But why should it be  
22      at a punitive level assessed? It should be at

1 something that would be commercially more  
2 compensatory.

3 CHAIRMAN KHOURI: Are we speaking in  
4 terms of the difference of stage one, stage two,  
5 stage three demurrage?

6 MR. PISANO: No because stage one, stage  
7 two and stage three are for time periods correct?  
8 As opposed to the actual weight level of the  
9 demurrage rate for that particular date.

10 MS. BOOTH: It probably depends on the  
11 tariff structure. I'm not a shipper, they would  
12 be in a better position to answer that. I think,  
13 Chairman Khouri, we tried to account for different  
14 types of scenarios in the policy statement and it  
15 is broken into different sections. I think Don  
16 was really describing what was section D of the  
17 policy essentially where there is a problem of  
18 weather or whatnot where the drayman and shipper  
19 can't get their cargo due to factors that prevent  
20 them from getting into the port. In those cases,  
21 it seems that a compensatory charge may be  
22 available.

1           The facts and circumstances may put you  
2       under a different section of the policy and it  
3       really, that's the whole point of the policy which  
4       is to have some flexibility to it depending on the  
5       timing of the issue. Is it a pick up during free  
6       time or not and depending on the circumstances.

7           CHAIRMAN KHOURI: I'm going to allow  
8       myself an extra minute, if I may. You raise an  
9       issue that segues rather neatly into your  
10      petition. In a number of places, refers to the  
11      1948 New York cases. I think the petition uses  
12      the words that you would like to, that the  
13      petition and your purpose is to revive the 48  
14      rules. In that case, and I'm not trying to get  
15      into the niceties, is it precedent, is it guidance  
16      et cetera. Let's just say the Commission has  
17      ruled in some of these areas for a limited  
18      geographic area. We all can agree on that.

19           The Commission then said, without  
20      turning it into a rate case, that initial first  
21      stage demurrage would be considered compensatory  
22      and then anything else would be considered

1       punitive. That is what the case says. Are you  
2       suggesting that we go to a totally different cost  
3       structure other than first stage demurrage, that's  
4       what I'm trying to understand what you're asking  
5       for.

6               MS. BOOTH: I do not believe that we are  
7       asking the Commission to restructure and determine  
8       the number of tiers of demurrage precisely that  
9       would exist, the level of the charges that would  
10      exist. But from a policy perspective, we are  
11      asking the Commission to look at these different  
12      scenarios and make some assessments as to  
13      unreasonable conduct depending on the situations  
14      where there is no control over the BCO or drayman  
15      to access the ports. In hindsight, reviving those  
16      rules was an overstatement. The basis of that  
17      decision explains why those rules were necessary  
18      and we have very, very similar conditions that  
19      happen to be occurring today, although the  
20      container traffic, not breakbulk traffic.

21             So, we do not want a prescription of the  
22      very specific terms, levels of charges, days of

1 free time et cetera. We want tools and guidelines  
2 to help industry self- govern itself. In some  
3 cases, as indicated in the policy statement, a  
4 charge of a compensatory demurrage rate would make  
5 sense but not a penal level. Because the BCO and  
6 drayman still can't get access to their cargo but  
7 there may be those situations under section D  
8 where some level of charge still makes sense. It  
9 should be more cost based although we're not  
10 asking you to determine precisely levels of  
11 charges.

12 CHAIRMAN KHOURI: Section D of your  
13 petition.

14 MS. BOOTH: Section D of the policy  
15 statement.

16 CHAIRMAN KHOURI: Yes, okay thank you.

17 MR. DIMICHAEL: It is very clear that  
18 the Commission has the power to declare something  
19 unreasonable. And that's what we're, in a sense,  
20 asking the Commission to do as a policy matter as  
21 a guideline. To say that unless you have this  
22 particular circumstance that we list in the B, C

1       and D's section, if you don't do that, that would  
2       be unreasonable. The Commission can prescribe  
3       saying, okay you have to charge \$7.52 but it can  
4       say that a million dollar charge is unreasonable  
5       or it can say that some other practices are  
6       unreasonable. That is well within the  
7       Commission's power.

8               CHAIRMAN KHOURI: I'm going to close  
9       with this in terms of the 48 rules and cases. They  
10      examined a number of, and I'm just going to touch  
11      on one. Something I'm sure Mr. Pisano, I'm sure,  
12      doesn't want to hear but they looked at some  
13      detail. Coffee and tea and other issues and that  
14      Commission held that the inspection was due to  
15      cargo and that the allocation of risk for that  
16      delay did not warrant extended free time. So,  
17      that is where the prior cases came down, and as I  
18      said, I'm not going to go through all the issues  
19      that the 1948 FMC Maritime Board at that point  
20      went through. I'm going to relinquish my time  
21      that I've gone over. Commissioner Dye.

22             COMMISSIONER DYE: You know that's not



1 going to work.

2 MS. BOOTH: Can I have quick response to  
3 that? I just have one quick follow up to that  
4 point. Two quick things. We recognize that  
5 customs exams, the level of control can vary.  
6 There may be circumstances where there is some  
7 aspect of operations at the port that impact the  
8 timing of when that hold is released and what have  
9 you. Because of that, we specifically put  
10 language in the policy statement, the only time  
11 that unreasonableness would happen or apply is  
12 where it is clear there is no fault of any kind on  
13 the part of the shipper and that the shipper would  
14 not be in the stronger position to have control  
15 over the circumstances. That is where, as Nick  
16 described, the policy statement is flexible and it  
17 would require some taking into account of the  
18 specific facts.

19 One last point is, the Port of Long  
20 Beach itself has adopted a specific rule relative  
21 to customs exams where it does not start free time  
22 until the customs hold is released. It seems to

1       us that that's evidence of a reasonable practice  
2       and it was something that we recognized and took  
3       into account in including this. We are not asking  
4       the Agency to do something that goes well beyond  
5       practices that don't already exist.

6               CHAIRMAN KHOURI: And make no mistake,  
7       Mr. Pisano, as I listened carefully to your  
8       example, that then you had two more free days and  
9       the port, as I understand it, taking facts as they  
10      were presented, said there were no appointments  
11      and I need to stay on the good side of  
12      pre-deciding all cases. But that would certainly  
13      trouble me quite fundamentally. Commissioner Dye.

14             COMMISSIONER DYE: So Nick, it seemed to  
15      me that what you just described was actually  
16      guidance to our ALJs.

17             MR. DIMICHAEL: Well yes. If a port or  
18      a carrier would get charged demurrage for  
19      something that was completely out of the shippers  
20      control, then what the policy statement would do  
21      and what would happen is, a complaint could be  
22      filed and then the ALJ would look at the policy

1 statement to consider how the Commission would in  
2 general look at a case like this. But the ALJ  
3 would, under the law, since it's simply a policy  
4 statement and not a binding rule, be able to say,  
5 first of all there are facts and circumstances  
6 here that make it unfair in this particular case.  
7 Or there are other circumstances for this  
8 particular case that that policy statement should  
9 not be applied. We could sit here and think of  
10 and just wonder all these kinds of circumstances  
11 that you may say well, it shouldn't be applied  
12 here.

13 COMMISSIONER DYE: That's their job to  
14 apply that to the facts.

15 MR. DIMICHAEL: That's their job but at  
16 least you would have, number one, the ALJ would  
17 have some guidance as to where the Commission  
18 would in general look at this in the ordinary  
19 circumstance and much more importantly, the  
20 carrier, the MTO, the shipper, the drayman, would  
21 have guidance as to where this would go if it  
22 would get to that. In all of these cases, people

1 look at something like that and say, look I can  
2 make a judgement here that I don't want to get  
3 into a big argument over this and so let's just  
4 settle it. That's what happens in 99.9 percent of  
5 the cases. It's only the cases where there is  
6 real dispute as to who is at fault or what is  
7 responsible or all sorts of factual circumstances  
8 that might not be clear would then parties go and  
9 do what the policy statement would allow and that  
10 is to have an actual complaint filed.

11 The reason why people don't file  
12 complaints now is there is nothing out there to  
13 let you know where things are likely to go. So,  
14 the risk of filing a complaint is gigantic, the  
15 cost of filing a complaint is more gigantic. So,  
16 you just simply don't do it and things just keep  
17 on going the way they have been.

18 COMMISSIONER DYE: Thank you.

19 MR. CHERIN: Commissioner, if I could  
20 just piggyback on that briefly. From the CTA's  
21 perspective, I want to corroborate what Mr.  
22 DiMichael just said. The reality is, there are

1 many alternative dispute resolution procedures  
2 available to truckers but they all carry with  
3 them, a tremendous cost burden. They all carry  
4 with them, a tremendous operational burden. For  
5 someone like Fred running his business day to day,  
6 he has to make a commercial decision whether it is  
7 worth the time or money to see this dispute  
8 resolution through which may put him back six  
9 months, nine months, twelve months, depending on  
10 which agency he goes to. It would truncate that  
11 issue if there was some overriding policy where he  
12 could go directly to the MTO or someone else and  
13 say, you know where this is going. The FMC has  
14 set a guideline that says that there is an  
15 exemption for problems out of our control. It  
16 would really take a lot of the burden and the onus  
17 on the day to day operations of the truckers.

18 COMMISSIONER DYE: Okay thank you. I  
19 have three areas that I want to talk with all of  
20 our witnesses today. Of course, I've become an  
21 advocate for the freight delivery system so I am  
22 most interested in your talking to me about the

1 effect on the systemic operation of our freight  
2 delivery system of these practices. By the way,  
3 we have lots of team members, FMC Innovation team  
4 members here today. Thank you for your service to  
5 the Federal Maritime Commission. We appreciate  
6 it. The report summary is available in the back  
7 for those of you who are interested. We do  
8 believe that the national seaport system as we had  
9 worked on it and I believe that the Los Angeles  
10 system is the only one who's actually pursuing  
11 that today. I would say to you, if your port is  
12 interested in that, run that down. Because the  
13 essential pieces of information that would be  
14 available in that system would address this  
15 problem as well as what we hope as many others.

16 Nick, it has been a long time since you  
17 and Karen and I talked about confidential service  
18 contracts. Something like 1995 or something.

19 MR. DIMICHAEL: That was a wonderful  
20 time.

21 COMMISSIONER DYE: Yes it was. What is  
22 standing in the way -- I understand that not all

1 shippers have the contractual ability to dictate  
2 terms. What is standing in the way of service  
3 contracts handling these demurrage and detention  
4 approach problems? You've pointed out that there  
5 are some very worthwhile approaches.

6 MS. CROWE: Keep going.

7 COMMISSIONER DYE: That's for you.

8 MS. CROWE: Quite honestly, we would  
9 love to be able to have a business discussion and  
10 leverage our volume but our contracts are still  
11 with the carriers. The carriers are then limited  
12 by what the terminals will give them. It comes  
13 down to, I want so much time in my contract, and  
14 then that ocean carrier has to try to negotiate  
15 with the terminal to get that time. We've had  
16 instances where the ocean carriers have come to us  
17 and said, can you help us negotiate with these  
18 terminals because they're not going to give us  
19 anything.

20 COMMISSIONER DYE: But there, the  
21 customers of the terminals.

22 MS. CROWE: Yeah but I think once you're

1       locked in, once you have assets in that market,  
2       I've got one option so they have no reason to  
3       negotiate with me.

4               COMMISSOINER DYE: Do they compete on  
5       these tariff practices? Do you choose based upon  
6       those approaches?

7               MS. CROWE: When I have options, so when  
8       it is a larger area like on the west coast, we get  
9       very specific on how we choose what carrier we're  
10      going to use and what terminal our business is  
11      going to go to. It's not just the free time but a  
12      lot of times it is, can I get access to the cargo,  
13      can I get it off the terminal in time so I don't  
14      ever have to get to the point of paying demurrage.  
15      But on the other side of the world where you have  
16      one port, one option, there is no choice for me  
17      other than to go there.

18              COMMISSIONER DYE: I see.

19              MR. DIMICHAEL: If I could just add  
20      something and I'm working from memory here. I  
21      believe the Commission's April 2015 report talked  
22      a little bit about this and about contracts and



1 the whole thing of negotiation. But what that  
2 report said, that although you can negotiate  
3 service contracts for many terms, you don't often  
4 get negotiation for demurrage and detention.

5 COMMISSIONER DYE: Why is that?

6 MR. DIMICHAEL: The report was vague  
7 about why. I think you've heard here from our  
8 witnesses is the reason is, that this structure of  
9 the carrier, shipper and the MTO is getting in the  
10 way of those things.

11 MS. CROWE: Yeah we don't have that  
12 direct contract with the terminals so we just  
13 don't have any leverage with those terminals to  
14 work deals.

15 COMMISSIONER DYE: Right.

16 MR. PISANO: I would like to add, if I  
17 may, that although we may negotiate what the free  
18 time period may be whether it is for the demurrage  
19 or for detention periods, to establish what would  
20 be determined as a disability period would be  
21 impossible, particularly for a small company like  
22 my own company to try to negotiate. I've even had

1 difficulty trying to change the arbitration clause  
2 allowing for the Federal Maritime Commission  
3 Office of CADRS to hear the arbitrations. It's  
4 got to go to their head office and it goes back  
5 and forth. I had only two carriers that were  
6 willing to agree to the arbitration clause for the  
7 FMC and then the next year it disappeared and I  
8 had to go through the whole process. They said  
9 no, we don't want to do that anymore.

10 COMMISSIONER DYE: Yeah. You gave us a  
11 few examples here of carriers and one terminal as  
12 well. Are there other terminals, carriers, ports,  
13 who do this well?

14 MS. CROWE: Who operate well?

15 COMMISSIONER DYE: Yes. You would hold  
16 up as good examples for demurrage and detention  
17 practices.

18 MS. CROWE: Honestly, I hate to answer  
19 vaguely but a lot of it depends on the year.  
20 You've got years where I can say, this year we had  
21 great business on the west coast. We did not have  
22 a lot of problems there. Again, we choose exactly

1        what terminals we want to use and the northwest,  
2        the Seattle, Tacoma, they have been great to work  
3        with too, really working with us. The bottom line  
4        is, we want our cargo, that's what we want. If we  
5        can find ways to get access to our cargo then the  
6        rest doesn't matter. It's when we can't get that  
7        access and those fees based on our volume aren't  
8        little amounts of money. That's what we're really  
9        trying to do. I'm completely okay paying a fee  
10       when I can't get my cargo but that fee should not  
11       be punitive. It should be based on a partnership  
12       because I want to get my cargo, help me get my  
13       cargo. Don't just fine me the few times I can't,  
14       is what it comes down to.

15                COMMISSIONER DYE: Right.

16                MR. PISANO: And, of course, most of us  
17       can't determine what terminal to call.

18                COMMISSIONER DYE: I understand. Madame  
19       Secretary, how much time do I have?

20                CHAIRMAN KHOURI: Just proceed if you  
21       want to.

22                COMMISSIONER DYE: I just have one more

1 area and then I'll yield. In the event that there  
2 are disputes, we know from business research that  
3 the customer service employees who are empowered  
4 at the lowest level to resolve disputes quickly,  
5 usually work for profitable companies. Can you  
6 tell me who has good dispute resolution services  
7 in this area when there are charges and you want  
8 to work with a company to resolve them. I'm not  
9 going to ask who is bad at it, who is good at it?

10 MS. CROWE: I have an example where the  
11 Port of Long Beach actually stepped up when we had  
12 a situation that was very difficult and they  
13 worked directly with us. They pulled in the third  
14 party terminal where we were having challenges  
15 getting our cargo and not only did they help us  
16 get a resolution, they facilitated. Again, it's  
17 all about moving the freight. Just let me move  
18 the freight. They found the problem and they  
19 worked with us to be able to find a solution. It  
20 didn't get to the point where we had to call the  
21 FMC and say hey, we're stuck. So, I would say that  
22 was one of our best examples.

1                   CHAIRMAN KHOURI: Before or after  
2 Chairman Cordero?

3                   MS. CROWE: It was actually after.

4                   MR. CHERIN: Commissioner, I can provide  
5 just another small real world example. Again,  
6 going back to the Port of Long Beach because  
7 Commissioner Cordero is in the audience. Long  
8 Beach Container Terminal, I think, if you were to  
9 pull local draymen, would say probably has the  
10 most efficient dispute resolution process.  
11 Coincidentally, they also happen to have the most  
12 efficient gate turn times, trucker interface and  
13 that is because there is a nexus with the capital  
14 investment that they've made. I think if you were  
15 to canvas terminal operators and others throughout  
16 the country, you will see a direct relationship  
17 between the amount of investment they have made in  
18 new technology and infrastructure and the  
19 efficiency that they realize, at least in the eyes  
20 of the drayage community, and I think that spills  
21 over to the dispute resolution process as well.  
22 So, we would ask you to look at Long Beach

1 Container Terminals as a real world example.

2 COMMISSIONER DYE: Okay thank you. Thank  
3 you very much.

4 CHAIRMAN KHOURI: Thank you.

5 Commissioner Maffei:

6 COMMISSIONER MAFFEI: Thank you very  
7 much, Mr. Chairman. Thank you again to the  
8 panelists. I'll start with Ms. Booth and Mr.  
9 DiMichael. To me, your arguments for a petition  
10 for additional action would have increased  
11 credibility if there had been many cases filed  
12 where a lack of such a policy statement caused  
13 either the case to be dismissed or unsuccessful  
14 due to lack of definition of unreasonable. Have  
15 there been such cases and briefly if not, why not?

16 MS. BOOTH: Is your question whether or  
17 not there have been demurrage and detention cases  
18 brought to the FMC?

19 COMMISSIONER MAFFEI: Yes. Why have no  
20 cases been brought under section 10(d)1 of the  
21 Shipping Act.

22 MS. BOOTH: Yeah thank you, Commissioner

1 Maffei: I think Nick had eluded to this and I  
2 think the business people can probably even speak  
3 more strongly to it. My belief is that complaints  
4 have not been filed because there is no standard.  
5 It is the sheer lack of understanding about how  
6 the unreasonable standard is interpreted that  
7 creates tremendous uncertainty for the businesses.  
8 And no business who is trying to get their cargo  
9 out of a port and there is an immediate problem,  
10 take the time to hire lawyers, file a complaint,  
11 prepare a complaint, file a complaint, litigate a  
12 complaint that might take a year or two to get an  
13 answer without any standard. So, it is the lack  
14 of clarity, it's the cost, it's the uncertainty  
15 and the time where there is an immediate business  
16 problem. And so --

17 COMMISSIONER MAFFEI: No but in other  
18 areas, such standards are established in court.  
19 When there is an interpretation of a particular  
20 word they establish it in court. I understand  
21 that but there are groups, trade groups that could  
22 bring a test case, for instance.

1                   MS. BOOTH: Well, they can only do that  
2           if the business people think that the risk is  
3           worth doing. I guess I would say that a sister  
4           agency, the Surface Transportation Board, very  
5           recently took on the issue of demurrage in a  
6           different context. They chose, they recognized the  
7           uncertainty dealing with rail demurrage. It was a  
8           different scenario than port congestion. It dealt  
9           with warehouse men and intermediaries. It was  
10          because those cases were more complicated as is  
11          the case of port congestion, that the STB chose to  
12          take on demurrage. They actually chose to issue  
13          binding regulations. That's not what we're  
14          seeking, as you know. I think that was in 2014  
15          and we'd be happy to get you a reference to that  
16          case. I think other agencies have decided to take  
17          it on themselves.

18                 COMMISSIONER MAFFEI: I guess. But I  
19          think that is important, the difference between  
20          binding regulations and so- called guidance, what  
21          you're asking for, because let's say we were to go  
22          forth and issue such guidance. Wouldn't it still



1       be just as difficult for any of these folks to  
2       bring cases? They still have to bring a dispute  
3       case in order to have satisfaction here and it is  
4       just as expensive isn't it?

5               MR. PISANO: Well Commissioner, let me  
6       respond to your earlier part of the question which  
7       was, why haven't there been that many claims made  
8       to the Commission before. It's because we're  
9       dealing with this situation on a day to day basis.  
10      You're dealing with one container at a time or two  
11      containers at a time, one bill of lading at a  
12      time. For me to enter up my business and take time  
13      out of my business to make a complaint against a  
14      single containers worth of demurrage of \$325 which  
15      I know should have been assessed, it's not worth  
16      my while to dispute one individual. If you have  
17      multiple, it's like death by a thousand cuts.

18             COMMISSIONER MAFFEI: Yeah but excuse  
19      the interruption. Why would it be your worthwhile  
20      if there was guidance? I mean you know, it sounds  
21      to me, particularly in many of the examples we  
22      read in the various comments, that these are cases

1       where it is clearly unreasonable. If it is  
2       clearly unreasonable from like any observer's  
3       definition, us saying, here's a guideline it's  
4       unreasonable. You still have to bring the case.  
5       It still could be, I appreciate your comment. As  
6       you say, too small potatoes, or in your case,  
7       coffee, to be worth the legal action. You'll still  
8       have to bring it even if we have guidance. So,  
9       why is that different?

10               MR. PISANO: Yes but there will be much  
11       fewer instances where we would have this. Because  
12       if you establish what is fair and what is  
13       reasonable, then the instances where you were not  
14       assessed something that was unfair or unreasonable  
15       would be greatly diminished. That's why the  
16       establishment of a policy would benefit the entire  
17       industry, not only ourselves but it would also  
18       benefit the flow of movement throughout the  
19       terminal.

20               COMMISSIONER MAFFEI: You think the  
21       issue of guidance alone would be that deterrent?

22               MR. PISANO: Clearly.

1 MS. CROWE: Absolutely.

2 COMMISSIONER MAFFEI: Fair enough. A  
3 question back to you Ms. Pisano and Ms. Crowe who  
4 mentioned this and anyone else who wants to chime  
5 in. You talked about how these are punitive  
6 rather than compensatory charges. How do you know  
7 that?

8 MR. PISANO: Frankly, it was designed  
9 that way. It was designed years ago, as I said  
10 earlier I've been in the business for a long time.  
11 Years ago, you used to have ten days' worth of  
12 free time and the demurrage used to be \$60 a  
13 container or \$50 a container. Free time took a  
14 dramatic change with the assessment of free time,  
15 took a dramatic change and went from say ten days  
16 down to four days. And the increase of the  
17 demurrage charges went from what they thought was  
18 not really a punitive level, went from \$60 up to  
19 \$200 or to a level that was far more in excess of  
20 what the actual cost would be for the use of it.  
21 I use the example and people heard me say this. I  
22 can park the container in a theater district in

1       Manhattan than I can at the Port Elizabeth.

2                   COMMISSIONER MAFFEI:   That's  
3       interesting.   One other question and this gets  
4       back to a point that the Chairman was making.   In  
5       your testimony, you talk about cases in which it  
6       is not the fault of the beneficial cargo owner  
7       that they can't get their container and there are  
8       several examples in there.   Are you saying that it  
9       is, in fact, the fault of the MTOs because there  
10      is a difference, I guess, between something that  
11      is equally not anyone's fault and the fault of the  
12      MTOs.   It would be helpful, to me anyway, if we  
13      could be honest about what you're saying.   Are you  
14      saying that whether it's a failure for labor  
15      disputes, the result of labor disputes or lack of  
16      organization or refusal to open gates longer.   Is  
17      it, in fact, the MTOs fault?   Are those the kind  
18      of cases that you're interested in?

19                  MR. DIMICHAEL:   What we're talking about  
20      here and let me start and then perhaps others can  
21      talk too.   We're talking about the purpose of  
22      demurrage to incentivize removal.   When that

1 purpose can't be met because the shipper, for  
2 example, can't get there, then the whole purpose  
3 of demurrage is frustrated. So, why should there  
4 be a charge in that case when the shipper or the  
5 drayman can't do anything. The second point is,  
6 we kind of talked a little bit about this with  
7 Commissioner Dye. You look at something and you  
8 kind of say, okay who can do something about this.  
9 Is it the shipper or the MTO that can do something  
10 about this, is it the carrier is it the drayman,  
11 who is it. You shouldn't be putting the demurrage  
12 charge on the party who can't do anything about  
13 it. In most of these cases, it's the carrier and  
14 the MTO that can do something about it. Whether  
15 it's the snow storm, clearing the port, whether  
16 it's investment in the port because you have  
17 larger ships now and you need to get the  
18 containers off quicker. So, things in a sense  
19 look like they aren't the fault of anybody, we're  
20 not saying that the carrier is responsible for a  
21 snow storm, but the carrier can fix the problem --  
22 it is much more likely that the carrier is going

1 to be able to fix or at least alleviate the  
2 problem much more likely.

3 COMMISSIONER MAFFEI: What if we said,  
4 and this is highly theoretical, but what if we  
5 said, it is unreasonable to charge the punitive  
6 charges but it is still reasonable to charge  
7 compensatory?

8 MR. DIMICHAEL: The section D actually  
9 of our proposed policy statement says exactly  
10 that. That where the carrier can do what it is  
11 supposed to do but the shipper can't get there,  
12 the carrier can charge compensatory. So, that's  
13 actually part of the section D of the policy  
14 statement.

15 COMMISSIONER MAFFEI: One last question  
16 at least for now. This goes to Mr. Chair who I  
17 know has mentioned this and Mr. Leef and, I think,  
18 Ms. Crowe has talked about this before. When we  
19 talk about LA Long Beach, the big impact of things  
20 like weather events and labor slow down, meaning  
21 congestion, the delays caused by lack of hours of  
22 operation. The Pier Pass program was introduced

1 as one way to address this. Do you think this has  
2 been an effective approach and do you think it  
3 would be useful for similar programs at other  
4 ports?

5 MR. CHERIN: I think Pier Pass, and I'm  
6 on record as saying this and I know the Harbor  
7 Trucking Association as well. Pier Pass has been  
8 an effective way to, as an environmental program,  
9 a way to divert truck traffic from the day to the  
10 night. However, our criticism of Pier Pass is the  
11 same as with detention and demurrage. That is  
12 that one party in a multiparty supply chain  
13 controls the gate. As long as you have that, they  
14 will always do what's in their best economic  
15 interest first and they will do what's best for  
16 the efficiency of the larger supply chain second.  
17 So, much like our criticism of Pier Pass asking  
18 for an independent body, such as the FMC to issue  
19 guidelines and principles, our criticism would be  
20 the same of Pier Pass. And that is that for it to  
21 be effective and to regulate gate access, you have  
22 to have a neutral third party potentially

1 administer that program.

2 COMMISSIONER MAFFEI: Ms. Crowe, do you  
3 want to add anything?

4 MS. CROWE: I would just say, I think  
5 when Pier Pass started it was for a reason.  
6 Everybody was used to working on the standard day  
7 shift. What Pier Pass did was it incentivized  
8 people to actually open their facilities in the  
9 evening and to work the evening hours. But if you  
10 look at where we're at today, we have appointment  
11 systems, we have visibility systems that are  
12 interacting. The traffic is mitigated and  
13 regulated through the way the terminals are  
14 operating and how we're accessing our cargo. I  
15 don't know if Pier Pass, what it started out to do  
16 is what it is currently doing.

17 COMMISSIONER MAFFEI: Yeah, go ahead.

18 MR. JOHRING: When Pier Pass was  
19 created, we were complaining, one of the reasons  
20 it was created was to mitigate the law that was  
21 passed that said 30 minute turn times weren't  
22 being achieved, 30 minutes turn times. So, its



1 goal was, I thought, was to bring us back to 30  
2 minute turn times. It has never gotten close. As  
3 a matter of fact, we're not even close to an hour  
4 turn times on average. I would say last month,  
5 just guessing, our average was 89 minutes with a  
6 delta up to four hours. If there is anybody at  
7 fault for the turn times, it certainly isn't the  
8 trucker. It certainly is the terminal that  
9 controls the labor that pushes the turn times.

10 COMMISSIONER MAFFEI: Okay thank you  
11 very much, Mr. Chairman.

12 CHAIRMAN KHOURI: Thank you. For the  
13 sake of time, we may end up wanting to do a few  
14 extra questions post hearing. While we're here,  
15 I'd like to explore two things. One, Mr.  
16 DiMichael and anyone else that wants to comment, I  
17 think when we keep trying to talk about, well is  
18 it the fault of the American Coffee Corporation or  
19 is it the fault of Wal-Mart, that we're not  
20 picking up this container et cetera. Mr.  
21 DiMichael, I just have a little bit of concern  
22 with such an easy statement that, well the carrier

1       could plow the terminal faster. Where I'm going  
2       with this is, when we get caught up with the  
3       concept of fault, does this sort of misdirect us  
4       in a way because I think perhaps should we focus a  
5       little bit more on, at what point is the risk of  
6       certain things happening, transfer from the  
7       carrier to the consignee. And as an example, I  
8       just have trouble thinking that during the labor  
9       disputes, I'll just use as an example. The labor  
10      disputes started in July, August of 2014 and then  
11      starting to alleviate and things straightened out  
12      in January, February of 2015. That those carriers  
13      with 20 and 25 ships at anchor, paying crew, not  
14      able to tender their cargo, that that was an  
15      efficient money making proposition for them. I  
16      think they would have much preferred from a  
17      standpoint of efficient operations.

18               In New York, coming into the harbor and  
19      there's fog and there's a snow storm and they have  
20      to go to an anchorage before the harbor master  
21      will even allow them in. They accept that as  
22      their risk until the point in time comes that the

1 container is successfully offloaded from the ship  
2 and it has landed onto the dock. Now cargo, you  
3 have five days to come pick it up. Rather than  
4 fault, at what point does that shift of  
5 responsibility go to be BCO and then the snowstorm  
6 comes. A part of what I hear is, well at that  
7 point, we have a snow storm and now the risk of  
8 snow comes back to the carrier. Is that a -- I'm  
9 being a little bit editorial to frame up the  
10 discussion.

11 MR. DIMICHAEL: No, I think you're  
12 exactly right in this. The thing that we're, well  
13 let me get back. The purpose of demurrage going  
14 back through Commission precedent for years and  
15 years and years is incentivization to do  
16 something. That's the thing that I think we need  
17 to focus on. Who is best incentivized to do  
18 something for whom and who is the party for that  
19 incentivization just doesn't work at all. So,  
20 that's what we're kind of going to here where the  
21 purpose of demurrage is to incentivize the shipper  
22 to move the stuff off. I'm sure the port doesn't

1       -- it's not happy at all for the port to be in a  
2       snow storm or for the port of have huge  
3       congestion. But for the shipper, the shipper has  
4       no influence over being able to do something about  
5       that in that case. And in those cases, the port  
6       or the BOCC has more ability. So, it's unfair,  
7       unreasonable for the shipper looking at the  
8       purpose of demurrage to be charged in that case.

9               MS. BOOTH: And just one quick follow up  
10       on that, I think that you talked about at what  
11       point does the risk shift. It will vary under the  
12       circumstances, of course. But just to clarify  
13       particularly under B of the policy statement, we  
14       do all need to recognize that there is a common  
15       carrier obligation to tender the cargo for  
16       delivery and provide a reasonable period of time  
17       for pickup. And it's in those cases where  
18       sometimes you can't even get in during the free  
19       time period and yet the practices to allow that to  
20       expire and then assess charges. Where the policy  
21       statement would say, the reasonable practice here  
22       is to extend because the carrier hasn't been able

1 to complete its common carrier obligation under  
2 the law.

3 And then the policy statement works down  
4 into other scenarios post free time and I think  
5 Chairman Khouri kind of getting more into those  
6 where it can get a little grey or not. But I  
7 think section D, I just want to be clear,  
8 indicates that we would not say that in all cases,  
9 the carriers and terminals should not recovery  
10 anything. But, in fact, compensatory demurrage  
11 should apply in those difficult cases where it is  
12 a more forced situation, free time has already  
13 expired, the BCO couldn't get there for whatever  
14 reason or didn't attempt to during free time. I  
15 just don't want to get us bogged down into all the  
16 details of the policy statement but I do want to  
17 state that it does try to address some of these  
18 factors as to timing, the carrier's legal  
19 obligation and then force where compensatory  
20 demurrage would apply.

21 CHAIRMAN KHOURI: And if I can comment,  
22 we can -- I appreciate you using the term, bogged

1 down in the details. Therein, is the exact  
2 problem we struggle with from the Commission's  
3 standpoint is, there are so many details and  
4 having a simple unified rule for all 255 terminals  
5 around the country becomes problematic. Let me  
6 move on to the other one and then we're going to  
7 have to make a decision whether we go ahead and  
8 have the second panel before or after lunch. Let  
9 me ask for Mr. Pisano and any of the other  
10 interests here, you made reference to, you used  
11 the term infrastructure here in the U.S. to  
12 address your concerns. Many of the carriers have  
13 reduced down to rather small shops through U.S.  
14 interests. Can any of you all comment on not  
15 having carrier representatives with sufficient  
16 corporate authority to promptly here in the U.S.  
17 to be aware of those situations. Specifically, in  
18 the ports that they're assigned to handle and be  
19 able to timely respond to your concerns and  
20 disputes.

21 MR. PISANO: Well, I'd say that I had a  
22 recent situation where we've had an instance where

1 we've maintained a situation that was beyond our  
2 control and we tried to mitigate the penalty.  
3 This was \$10,000 on three containers that were  
4 held up. It was completely due to customs and  
5 other issues which we had no ability to move the  
6 containers out. It took, first off, I had to pay  
7 for it up front. I had to pay the \$10,000 up  
8 front. And then it took about two months of  
9 contacting through my sales rep to try to get a  
10 resolution on the matter. And then they came back  
11 and finally said, okay we'll give you a 25 percent  
12 discount on it. This was something that was  
13 completely punitive and beyond my control. Three  
14 containers and I said, well that's not acceptable.  
15 I said can we split it, can we do it at 50  
16 percent. It came out, 30 percent was the most  
17 they would do. I still haven't been paid, I don't  
18 have a credit on my books. I have asked and  
19 followed up on it about six times in the past two  
20 months and it's in process. This is just a  
21 typical example.

22 CHAIRMAN KHOURI: Anymore questions?

1                   COMMISSIONER DYE: I have a couple of  
2 more questions but I can submit those in writing.

3                   COMMISSIONER MAFFEI: I just have one  
4 more.

5                   CHAIRMAN KHOURI: Go ahead.

6                   COMMISSIONER MAFFEI: Just looking at,  
7 we talked a little bit about weather but just to  
8 focus in a little bit more on the government  
9 inspection. Actually, weather you brought up a  
10 good example that at least the terminal could do  
11 something about that or whatever. But government  
12 inspection really, actually the terminal is going  
13 to argue that if anybody can do anything about  
14 that it's because it's the kind of cargo that that  
15 actually does have more to do with the BCO or the  
16 shipper. If I miss a plane because my bag was  
17 pulled at the TSA line and I got there early  
18 enough but there weren't enough TSA workers to  
19 inspect my bag and I missed the plane and the next  
20 one just happens to be a more expensive flight, is  
21 that unreasonable, no, of course not. Can you  
22 tell me a little bit more in these cases of



1 government inspection is it again, down to simply  
2 that they should be able to charge compensatory  
3 but not punitive. Is that what we're talking  
4 about again? I just want to focus in on those  
5 particular issues of delays due to government  
6 inspections.

7 MR. PISANO: Well, I think that would be  
8 something that could be considered as a  
9 resolution. Also, the fact of the matter is that  
10 it's the terminal operators that make the movement  
11 and handle the control of the containers. Whether  
12 that's due to their productivity, I know customs  
13 can choose priority containers over others but a  
14 lot of the movement of the containers to the  
15 inspection site or to the VACCAS site is actually  
16 outside of my control.

17 COMMISSIONER MAFFEI: I guess, isn't it  
18 just the cost of doing business. Just like if I'm  
19 trying to get on this plane and I get nipped by  
20 TSA, what can I do. It's not the airlines fault.  
21 So, isn't it just part of, maybe it's an  
22 unfortunate world but we all have to be safe? Why

1 necessarily should that be on -- you know what I'm  
2 saying. I understand an issue in situations where  
3 you can't get it because they can but in this  
4 case, shouldn't you just build in, in your  
5 business model, that there's going to be some cost  
6 for those kinds of containers in those situations  
7 which should be fairly rare or at least not the  
8 standard.

9 MS. CROWE: I would say yes. I mean, we  
10 don't expect every container that has a problem to  
11 get out the gate after free time. We understand  
12 we're going to have to pay some fees. We just want  
13 the fees to be not painful to pay and we want to  
14 be able to feel more like a partnership in that so  
15 we can have a conversation on that versus being  
16 dictated to that you must pay this unreasonable  
17 fee that we feel is unreasonable. Because we do  
18 budget for demurrage, we know we're going to have  
19 to pay some but we want it to be a fair amount.

20 MR. CHERIN: Commissioner, if I could  
21 just piggyback on that from the CTA standpoint and  
22 the drayman. I think we have no issue or problems

1 if we miss an appointment or if it's our fault and  
2 we also are cognizant of the fact that there are  
3 going to be government inspections and I think we  
4 account for that. But that is a really de  
5 minimous percentage of the overall delay pie for  
6 lack of a better term. I think most, if not all,  
7 of the delay that we reference and we talk about  
8 in our statement is decisions or activities within  
9 the discretion of the marine terminal operator.

10 COMMISSIONER MAFFEI: Yes I'm not saying  
11 you should have this but if you have any data on  
12 the various reasons for delay, we would love to  
13 see that if you could submit it for the record.

14 MR. CHERIN: Both the CTA and the HTA  
15 would be happy to provide some of that data in  
16 post testimony comments.

17 COMMISSIONER MAFFEI: Thank you, Mr.  
18 Chairman, for the added time.

19 CHAIRMAN KHOURI: One last question I'd  
20 like for the panel to take for just a couple of  
21 minutes. I've listened in my notes, I think every  
22 one of the panelists talked about appointment

1 systems in one shape, form or another. It's  
2 something that has really grown over the last  
3 number of years. I go back to the 1948 case and  
4 they actually discouraged appointment systems. But  
5 now they are becoming more and more the way things  
6 are done. When you call during your free time and  
7 I'm not talking about on the fifth day at the  
8 eleventh hour but normal free time and they say,  
9 sorry, no appointments until next week and you  
10 say, but that's going to put me into demurrage  
11 terms. What do they say? I assume you're saying  
12 that's not fair or stronger words. I sailed, I  
13 know that other language.

14 MR. JOHRING: We have 12 terminals the  
15 last time I counted in LA Long Beach. You would  
16 probably get 12 different answers from them. The  
17 answer I got last week on three containers that we  
18 were trying from Wednesday on to get appointments  
19 and couldn't get them was, sorry, pay the  
20 demurrage and come get them. The next appointment  
21 is Saturday. Thank God they were open on Saturday  
22 because it was only \$675 instead of \$1900 on

1 Monday. Again, that's very typical of what we're  
2 seeing on a day to day basis.

3 CHAIRMAN KHOURI: This is not snow, this  
4 is not anything else. This is an act and as Ms.  
5 Booth and Mr. DiMichael correctly point out, the  
6 law says you have to tender, it's a legal term,  
7 for five days. Do you say, but you're not  
8 tendering for five days. What do they say? I'm  
9 sure there is some carrier interest here that  
10 realized that they're going to get some questions  
11 too.

12 MR. JOHRING: That's not an argument  
13 they'll even listen to, it's just not. It's so  
14 typical that they'll have it not available two or  
15 three days in that five days or four days and the  
16 world goes on, demurrage goes on.

17 COMMISSIONER DYE: And there is a clause  
18 in the tariff statute that ensures that a tariff  
19 is actually an implied contract with users of the  
20 port. Some of us talked about tariffs and tariff  
21 problems also since 1995. But that is binding for  
22 that reason. Also, just one thing and then I'm

1       done. If you could give us some of the STB  
2       approaches in areas that you believe are like the  
3       things that we're discussing. Thank you.

4               COMMISSIONER MAFFEI: Mr. Pisano, if  
5       next time you could bring some of your product to  
6       sell in the lobby, that's my only other request.  
7       I would appreciate that. These are filled with  
8       water, unfortunately.

9               CHAIRMAN KHOURI: Thank you to everybody  
10      on this panel. We did run over but I think for  
11      good reason. This is the petitioners panel and I  
12      wanted to give them as full an opportunity to  
13      speak. We could talk offline with what you want  
14      to do tomorrow. Unless the second panel wants to  
15      stay right now, feel free to raise your hand. I'm  
16      going to make a judgement call and say let's go  
17      ahead and do lunch now and then do the two panels  
18      in the afternoon. Does that suit everyone?

19              MS. DICKON: Mr. Chairman, I would  
20      recommend we start at one in that case.

21              CHAIRMAN KHOURI: 1 p.m. it is.  
22      Excellent idea. Thank you again. Okay thank you.

1 MS. BOOTH: Thank you very much.

2 (Recess)